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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 745.

THE SCHENECTADY UNION PUBLISHING COMPANY, *Petitioner*,

v.

MARTIN L. SWEENEY.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The ruling of the District Court does not appear in the official reports, but is set out at R. 14-22. The decision of the Circuit Court of Appeals is reported in 122 F. 2d 288 (R. 27-33). The memorandum by the Circuit Court of Appeals denying a petition for rehearing will be found at R. 35.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 18, 1941 (R. 27), and a petition for rehearing was denied on August 15, 1941 (R. 58). The petition for a writ of certiorari was filed November 15, 1941, under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 [28 U. S. C., Sec. 347(a).] Certiorari was granted on December 22, 1941, Mr. Justice Jackson not participating (R. 37).

STATEMENT.

Complaint.

On December 14, 1939, the respondent, a duly elected member of the Congress of the United States from the State of Ohio, filed his complaint for damages for libel against the petitioner, growing out of the publication on December 23, 1938, of an article under the caption "Washington Daily Merry-Go-Round" (R. 2-4), written by Drew Pearson and Robert S. Allen (R. 7).

Respondent pleaded general damages alleging that by reason of the libelous publication and its wide circulation, he had been greatly injured in his good name, fame and reputation, in the conduct and execution of his official duties as a duly elected representative in Congress, and in pursuance of his profession as a practicing attorney, in his standing in the community wherein he resides, and in the high regard, respect, confidence and esteem he had thereto enjoyed among his associates both in the Congress and in the legal fraternity and elsewhere (R. 3-4). By his bill of particulars respondent set forth the entire article published by petitioner and specified the parts thereof which were false and defamatory (R. 10-13). Where other individuals were named in the article, the allegation of falsity was restricted to the respondent (R. 13).

Answer.

The petitioner's answer contained a general denial, defenses of truth and fair comment and pleas of mitigation of damages, but raised no question as to the possibility of any infringement of the constitutional rights of freedom of the press and of speech (R. 4-7).

Thereafter, petitioner filed a motion for judgment on the pleadings, contending that the complaint did not state facts sufficient to constitute a cause of action (R. 13).

Opinion of District Court.

The District Judge at the outset proceeded to interpret the meaning of the words: "Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States," as imparting that respondent was allegedly opposing Mr. Freed's appointment to a federal judicial office merely because the latter was "a foreign born Jew" (R. 15). The Court incorrectly ascribed this as being "plaintiff's construction of the publication" (R. 15).

It will be hereinafter shown that, where the meaning of the words are in doubt, it becomes the duty of the jury, not the Court, to determine whether they are subject of a libelous interpretation. However, for the present, it will suffice to point out the obvious error of the lower court in supplying such a construction to the words in question. This may readily be observed by the simple expedient of substituting the noun for the pronoun in the second clause, " • • • and a *Jew* not born in the United States." Hence, the true import is revealed, the respondent was alleged to be opposed to Freed because he was a Jew and for the additional reason that he was a *Jew* not born in the United States. The charge could have but one meaning, Congressman Sweeney was anti-Semitic,—or speaking in the vernacular, a Jew hater,—and practiced it in his official position.

The decision does not purport to make applicable the principle laid down by this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. It merely recites that respondent asserted (as he does here) the New York law to be controlling and that decisions of other states were inapplicable (R. 15). On the contrary the opinion reveals that the lower court either did not follow the Erie Railroad decision or it erroneously applied the decisional law of New York.

The fallacy of the logic advanced in the opinion may be immediately observed from the court's own acceptance of the bigot's doctrine that "Prejudices relating to nationality and religion are quite common even in this country of constitutional right, liberty and equality" (R. 21). If such

be the criterion, then those things for which "constitutional right, liberty and equality," have always stood, are paralyzed ideals. With logic equal to that of the lower court, we could run through the gamut of crimes that fill our courts each day, and turn loose upon civilized society the culprits guilty of the "quite common" disturbances.

Nor can we condone prejudice and bigotry as the court did (R. 22) by reverting to the middle of the last century and resurrecting the "Know Nothing Party" as a present day example of the sum total of the labors of those who have fought and struggled to achieve the ideals in which our country was cradled.

Though the court felt constrained to denounce bigotry,—

"That there are such prejudices is greatly to be deplored. That there should be the fullest tolerance can not be questioned" (R. 22),

it nevertheless proceeded to extend judicial sanction to such attacks when falsely made on a public official, and granted petitioner's motion on the ground that the article was not such that it would hold respondent up to public scorn, contempt and ridicule! (R. 22)

Decision in Circuit Court of Appeals.

Judge Chase, speaking for the majority of the Circuit Court of Appeals, reviewed so much of the background of the case as was pertinent to a decision and noted particularly that litigation, involving substantially the same article had been commenced in other jurisdictions with results both favorable and unfavorable to the respondent. However, Judge Chase stated that decisions in other jurisdictions were not only conflicting, but were inconclusive for a decision in that Court, since the case must stand or fall on the application of the libel law of the State of New York, citing *Erie Railroad* v. *Tompkins,* 304 U. S. 64 (R. 28-29).

With maximum clarity and understanding of the issue at hand, Judge Chase, in speaking for the majority of the

Court, cited those well established principles enunciated so often by the New York Court of Appeals as to be axiomatic.

He reviewed the definition for libel found in two of the leading cases on the subject in New York, viz: *Kimmerle* v. *N. Y. Evening Journal, Inc.*, 262 N. Y. 99, and *Sydney* v. *MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, and also cited the fact that the definition found in both cases was in general accord with that found in the *Restatement of the Law of Torts, Sec. 559* (R. 29).

The Court correctly came to the conclusion that "the test is whether right-thinking persons would be reasonably expected to be induced by the publication to believe that it truthfully represented the plaintiff's attitude on the subject of Freed's appointment and would be likely to regard him as a consequence in such a way that his reputation was injured" in one or more of the respects set forth in the definition cited in the *Kimmerle* and *Sydney* cases, defining civil libel as it has been consistently defined by the New York Court of Appeals (R. 29-30). See cases *infra*, pp. 10.

The majority decision also recognized the eminently sound principle that a false statement, to be libelous *per se*, need not charge a violation of law, and that accusations of disgraceful *acts falsely* made of a public official which would lead right-thinking people to believe him unworthy of public trust and confidence are actionable *per se*, citing *Bennet* v. *Commercial Advertising Assoc.*, 230 N. Y. 125 (R. 30).*

Apparently recognizing the scourge of religious and racial hatred that in recent years has swept through some coun-

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* Petitioner (Pet. Br. p. 6n) apparently considers that Judge Chase committed a fatal error in citing as authority the *Bennet* case for the statement: "when made of public official, false accusations which may lead right-thinking people to believe him unworthy of public trust and confidence are libelous per se," whereas, the *Bennet* decision actually read, "unworthy of public trust and a betrayer of civic confidence." In the first place, Judge Chase did not purport to quote from the decision in the *Bennet* case, and in the second place, it would be "hair splitting" indeed, to contend that the proposition as stated by Judge Chase and as stated in the *Bennet* opinion is not synonymous.

tries of Europe, and which, to at least some extent, has imbedded its poisonous claws in the social structure of our own democracy,* Judge Chase, acknowledged that the charges imputed to respondent would entitle him to the acclaim of those individuals and groups devoted to the cause of spreading religious and racial hatred. But, the Court rightfully applied the doctrine enunciated by Mr. Justice Holmes, in *Peck* v. *Tribune Co.*, 214 U. S. 185, that a false publication need not entail universal hatred, that it is enough if a noticeable part of the reading public hold the accused up to hatred, scorn and contempt.

Clearing away all doubt as to the meaning of the charge against the respondent, Judge Chase said:

> "The context does not fairly permit reading the language as meaning the foreign birth of Freed the all sufficient cause of the plaintiff's opposition to his appointment, but rather the contrary by stressing the fact that he was a Jew whose foreign birth apparently but gave an additional basis for plaintiff's opposition." (R. 29.)

In addition, the Court also took into consideration the time and place of the publication, and the *current effect* of the publication (see *Levy* v. *Gelber*, 175 Misc. 746, N. Y., 1941):

> "And certainly the time and place of the publication must be given due weight and effect. This plaintiff by being accused of trying to deprive a man of an appointment to public office because, presumably both in race and religion, he was Jewish would, intolerance being what it is, no doubt gain approval and increased respect in some quarters; and in others, where only the hit bird flutters, there would be indifference; but in a country still dedicated to religious and racial freedom decent, liberty-loving people still are present in great numbers and still are greatly offended by the narrow-minded injustice of the bigots who see individuals only

* For examples we suggest the press clippings contained in petitioner's brief, Appendix, pp. 49-60.

en masse and condemn them merely because their ancestors were of a certain race or they themselves are or a certain religion. Those who hate intolerance are prone to regard the person who believes in and practices acts of intolerance with aversion and contempt. And in these times when it is universal knowledge that one foreign dictator gained his power by practices which included large-scale, unreasonable Jewish persecutions which have played an important part in making his name an anathema in many parts of this country the publication of such statements such as those alleged may well gain for the person falsely accused the scorn and contempt of the right-thinking in appreciable numbers. Freedom of speech is, as it always has been, freedom to tell the truth and comment fairly upon facts and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination.

"Moreover, in places where Jews make up a sizeable portion of the population, as they are known to do in part of the territory in which it is alleged that the defendant's newspaper circulated when the publication was made, it may be taken for granted that there will be an appreciable number who will hate or hold in contempt one who discriminates against a Jew merely because he is a Jew whether born in this country or not. A majority of the court is of the opinion that the complaint is sufficient under the principles above stated and that the defendant should be required to meet it on the merits.

"Order reversed and cause remanded for trial."

Minority View.

Judge Clark, dissenting from the majority opinion, (R. 31) appears to be constrained to the view that New York has adopted a "special rule" in the matter of public officials, and judicial license is extended to the libeler to publish what he pleases, just so long as the libeled official is unable to calculate in dollars and cents the loss to his reputation and so long as the scorn, contempt and ridicule heaped upon him is insufficient for his removal from office. The view stated in the dissent is obviously erroneous, and, particularly so, when applied to the facts in the case at bar.

Even a cursory examination of the New York decisions in *Tanger* v. *Crowley Pub. Corp.*, 240 App. Div. 203; *Gardner* v. *Home Life Pub., Inc.*, 237 App. Div. 200; and in *Hills* v. *Press Co.*, 122 Misc. 212, aff'd 214 App. Div. 752, cited as authority for the dissent, (R. 31) rather conclusively indicates that the facts in those cases were quite unlike the accusations directed at the respondent. In all three of those decisions, the rule of fair comment and criticism was invoked, since the alleged libels were clearly within the purview of the privileged class. The articles were merely *opinions* of the publishers predicated upon *truly stated facts*, hence the opinions deduced from such facts, although false, were excusable as fair comment and criticism. However, since in the instant case, respondent, by his bill of particulars, pleaded the *falsity* of each and all of the *stated facts* attributed to him, (R. 13) it necessarily follows that any deduction or opinion that respondent was opposed to Mr. Freed for *any reason* was not based upon *facts truly stated*.

Moreover, in erroneously misconstruing the article to be "comment" and "criticism" rather than false statements of the official *acts*, the dissenting Judge opines the rationale of the majority to be dangerous, in holding that comment, leading an appreciable number of the public to hate and hold in contempt, is libelous *per se* (R. 38). The fallaciousness of this is increasingly clear when it is noted that the decision of the majority did not turn on the question whether the publication was comment and criticism, rather were the words at once recognized as *false statements of fact* manifestly not within the rule of fair comment and honest criticism, and in holding the publication to be libelous *per se* the Court of Appeals correctly applied the rule stated, for a unanimous Court, by Mr. Justice Holmes, in *Peck* v. *Tribune Co.*, 214 U. S. 185. To hold otherwise would truly create "new law" in the face of the established precedent set in the *Peck* case.

In addition, the dissenting opinion erroneously relies on the "persuasive reasoning" of decisions in other jurisdic-

tions to sustain the minority view (R. 38). It is of course now well settled that such decisions are not only not controlling, but the law of libel being determined by the statutes and precedents of the particular forum, they lack even persuasiveness and understanding, in a jurisdiction having no such statutes and not bound by similar precedents. *Erie Railroad* v. *Tompkins, supra.*

LAW AND ARGUMENT.

Point I.

The Publication is Libelous Per Se Under All Applicable New York Authorities.

Petitioner's brief raises several points, but as it will be hereinafter seen the sole and determinative question, is whether the Circuit Court of Appeals correctly stated the law in holding the words complained of to be actionable *per se.*

The publication having occurred in New York, the law of that State, under the rule announced by this Court in *Erie Railroad Co.* v. *Tomkins, supra,* is controlling.

(*A*) *The Test to Be Applied.*

In the matter of public officials it is generally held that:

> "Words charging misconduct in office, want of official integrity or fidelity to public trust, words inconsistent with the due fulfillment of official duty, words which tend to deprive an official of his office, and words which are likely to produce public contempt and the reprobation of right minded men are libelous *per se. L. R. A. 1918-E. P. 23.* See also, *Newell, Libel & Slander,* (4 Ed.) pp. 44-45, and 36 C. J. Sec. 87, p. 1188.

There is hardly a case on record in which the courts have not explicitly stated that an article is libelous *per se* when it tends to expose the person to public hatred, shame, obliquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or tends to induce an evil opinion of one in the minds of right-thinking persons, and

to deprive one of their confidence and friendly intercourse in society, *in any one or more of these respects. Dall* v. *Time, Inc.*, 252 App. Div. 637 aff'd. 278 N. Y. 635; *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99; *Sydney* v. *MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208; *Bennet* v. *Commercial Advertiser Assn.*, 230 N. Y. 125; *Triggs* v. *Sun Printing & Pub. Assn.*, 179 N. Y. 144; *Morey* v. *Morning Journal Assn.*, 123 N. Y. 207; *Morrison* v. *Smith*, 177 N. Y. 366; *Gates* v. *New York Recorder Co.*, 155 N. Y. 288; *Mattice* v. *Wilcox*, 147 N. Y. 624; *Moore* v. *Francis*, 121 N. Y. 199; *Bergman* v. *Jones*, 94 N. Y. 51; *MacFadden* v. *Morning Journal Assn.*, 28 App. Div. 508; *Shelby* v. *Sun Printing & Pub. Assn.*, 38 Hun. 474, aff'd. 109 N. Y. 611; *Cooper* v. *Greeley, Denio*, (N. Y.) 347; *Root* v. *King*. 7 Cow. (N. Y.) 613; *Van Ness* v. *Hamilton*, 19 Johns (N. Y.) 349; *Steel* v. *Southwick*, 9 Johns. (N. Y.) 214; *Riggs* v. *Denniston*, 3 Johns. (N. Y.) 198.

The words, "expose him to hatred, contempt, ridicule," etc., do not constitute merely a "formulary definition," (Pet. Br. 11), but they are expressive as to the manner in which the reputation is injured. Without the descriptive power of words, the law would be compelled to revert to "picture writing" to enforce compliance with the statutes. In actions for libel, the question is, whether the publication tends to lower the accused in the opinion of men whose standard of opinion the Court can properly recognize—*the essential is that reputation is injured. Cohen* v. *New York Times Co.*, 153 App. Div. 242.

And, in ascertaining the libeler's liability, the *same principles* apply to a libel of a public officer or a candidate for office, as to libels of private individuals, unless the statements fall within the strictly confined limits of fair and honest criticism. *Cartright* v. *Anderson*, 208 App. Div. 1.

Petitioner urges that the recent policy of the State has been to limit and restrict the causes for actions in libel.*

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* As indicative of a broader policy obtaining in New York, petitioner quotes from the opinion in *Garriga* v. *Richfield*, 174 Misc. 315 (Pet. Br. 25), in which the Court held that charging one with being a "Communist" was not libelous *per se*. However, in a later

That such an assumption is utterly without merit is evidenced by the decision of the New York Court of Appeals in *Katapodis, et al,* v. *Brooklyn Spectator, Inc.,* (decided November 27, 1941), 287 N. Y. 17.

In the *Katapodis* case, defendant merely published false words tending to impute poverty to the plaintiffs and as such the words could excite not ridicule, but sympathy. However, the Court quoting from *Moffatt* v. *Cauldwell,* 3 Hun. (N. Y.) 26, stated:

> "But the proposition that ridicule is a *non sequitur* from such an imputation, is not universally true."

And, in affirming the Appellate Division, that the issue should be met on the merits, the Court said:

> "The reason is that in libel the matter is defamatory not only if it brings a party into hatred, ridicule or contempt by asserting moral discredit upon his part, but also if it tends to make him shunned or avoided, although it imputes no moral turpitude to him." Citing, "*Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures,* 50 T. L. R. 581; *Shelby* v. *Sun Printing & Pub. Assn.,* 109 N. Y. 611; *Kimmerle* v. *New York Evening Journal, Inc.,* 262 N. Y. 99."

In determining whether a given publication has injured the person's reputation, the *current* effect of the statements is the decisive test. *Levy* v. *Gelber,* (1941), 175 Misc. (N. Y.) 746.

A publication may be libelous although it is "only the exuberant expression of meridional speech," per Mr. Justice Holmes, in *Gandia* v. *Pettingill,* 222 U. S. 452; or if "superlative vilification has * * * overleapt itself and become unconsciously humorous," per Mr. Chief Justice Taft, in *Balzas* v. *Porto Rico,* 258 U. S. 298.

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case—*Levy* v. *Gelber,* 175 Misc. 746, the same charge was held to be actionable, without any allegation of special damage. Similarly, to the contentions advanced herein by the petitioner, counsel for petitioner "believe the *Levy* case was improperly decided." (R. 20n). But the *Levy* case *is the law in New York.*

Nor is it necessary that all or even a majority hold the accused up to ridicule, contempt, etc. As Mr. Justice Holmes said:

> "Liability is not a question of a majority vote, • • • obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about, or even known to all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm • • •." *Peck* v. *Tribune Co., supra.*

The *Peck* case has been cited as authority in *Meyerson* v. *Hurlbut,* (App. D. C.), 28 F. 2d 232; *New York Evening Post Co.* v. *Choloner,* (C. C. A. 2), 265 F. 204, certiorari dismissed 252 U. S. 591; *Summit* v. *Zetterlund,* 287 F. 579; *Security Benefit Assn.,* v. *Daily News Pub. Co.,* (C. C. A. 8), 299 F. 445; *Kraft* v. *New York Herald Co.,* 6 F. 2d 644; *National Refining Co.* v. *Benzo Gas Motor Fuel Co.,* (C. C. A. 8), 20 F. 2d 763.

Applying these long established rules of the law of libel, laid down by this Court and the Courts of New York, we have but to examine the publication to be immediately impressed by the correctness of the Circuit Court of Appeals' decision.

(*B*) *Decisional Law On The Question.*

The Circuit Court of Appeals determined the questions presented by applying to the publication at bar the law of libel as it has been administered with consistent regularity by the courts of New York and as it always was and is now at common law.

As we have pointed out, any publication which exposes the accused to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or tends to induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their confidence and friendly intercourse in society, is libelous

per se. And this is true when the publication is capable of causing harm in *any one or more of the above respects.* See cases cited *supra,* p. 10. Moreover, the *same principles* apply to a libel on a public officer or a candidate for office, as to libels on private individuals, unless the statements fall within the strictly confined limits of fair comment and honest criticism. *Cartright* v. *Anderson,* 208 App. Div. 1.

That the Courts of New York have consistently upheld this rule is well illustrated in the case of *Sumner* v. *Liberty Pub. Corp.,* (1934), 240 App. Div. 118. Sumner, a Deputy Commissioner of Internal Revenue, was charged with discharging experienced employees and hiring new ones, who, it was charged, could not obtain work without "political drag." In holding the article to be libelous *per se* the Court ruled that the accusation that Sumner "accepted public office and proceeded to eliminate competent employees and to substitute political incompetents either at his own volition or at the dictation of others, charges the grossest kind of misfeasance and betrayal of his public trust."

"Such a charge must necessarily injure the plaintiff in his good name, reputation and in his professional standing."

The analogy is quite clear when it is considered that the respondent, while he did not eliminate competent employees, was actually accused of attempting to prevent the appointment of a competent person to public office (and there is no suggestion in the article that Mr. Freed was not qualified) merely because the candidate was of the Jewish faith.

Also well in point is the case of *People* v. *McWilliams,* (1940), 22 N. Y. Supp. 2d 571. Defendant was charged with disorderly conduct under Sec. 722, subd. 1 and 2, of the Penal Law of New York, the accusation stemming from the actions of the defendant (known as "the Yorktown Hitlerite") in attempting to arouse bitterness and hatred against Jews. McWilliams was found guilty. Subsequently, this decision was reversed, *McWilliams* v. *People,* 31 N. Y. Supp. 2d 37, but the reversal was predicated upon a point of evidence, not on the general proposition that a person

accused of fomenting religious hatred against Jews is not to be found guilty of disorderly conduct.

To be accused of religious and racial bigotry might not under every conceivable set of circumstances be considered defamatory, but words, not otherwise actionable, become actionable, when they touch the person defamed in his office —such words affect him in his official capacity. *Kinney* v. *Nash*, 2 N. Y. 177.

It has been held libelous *per se*, to charge a corporation counsel of a municipality with working against the interests of the community that employs him; that the municipality's progress is handicapped by him and that its government is run by a ring of which he is one. *Corwin* v. *Berkwitz*, 190 App. Div. (N. Y.) 952. And, where a judge was accused of rewarding an assemblyman, who had introduced a bill raising the judge's salary, with "rich references," the court held the words to be actionable *per se*, since they subjected the plaintiff to a loss of public confidence and respect. *Hickey* v. *Corson Mfg. Co.*, 108 N. Y. Supp. 884, aff'd., 127 App. Div. 946. See also, *O'Leary* v. *New York News Pub. Co.*, 51 App. Div. (N. Y.) 2.

Similarly, words published of a Representative in Congress, to the effect that he was a fawning sycophant, a misrepresentative in Congress, a grovelling office-seeker who had abandoned his post in Congress to pursue an office, were held to be libelous *per se*. *Thomas* v. *Croswell*, 7 Johns. (N. Y.) 264.

Subject of a close analogy to the case at bar is *Lunn* v. *Littaner, et al.*, 187 App. Div. 808. Plaintiff, a Representative in Congress, was accused of being an agent of a group of tanners to secure permission for them to transport skins from Cape of Good Hope to the United States, but that the authorities in Washington had prevented him from diverting shipping necessary for war uses to carry prohibited skins. The Court, in holding the article to be libelous *per se*, said:

> "Clearly such language, used in the height of war excitement, was intended to expose the plaintiff to con-

tempt, ridicule, and disgrace, and this is the essential element of libel—it is libel per se. To be held out as a 'profiteer', or the tool of 'profiteers'; to be charged with lending one's self to the promotion of private interests at the expense of the national welfare—is to invite the hatred and contempt of people generally. This would be true to a considerable extent in time of public tranquility; in the presence of an aroused public sentiment, when a mere suspicion of unpatriotic or even neutral attitude was likely to excite the hostility of the unthinking, such a charge could not fail to bring the plaintiff into disgrace, and might, in many communities, have invited violence against his person."

Here, the respondent is accused of racial and religious bigotry—of being a Jew hater—not in a time of "public tranquility", but at a time when all right-thinking people generally have in no uncertain terms denounced those at whom similar invective has been hurled,—at a time when the name of Hitler had become an anathema, due in large measure to his persecution of the Jews.

Comparable, in its legal significance to the instant case, is the decision in *Burnham* v. *Hornaday*, 223 N. Y. Supp. 750, order mod. 223 App. Div. (N. Y.) 218. In that case both plaintiff and defendant were members of a federal committee to regulate migratory birds. Defendant had charged plaintiff, who was president of a gunmakers association, of opposing a limitation of an open season, etc., in order to improve the gunmakers' element of profit. The court held that it was libelous to impute to an officeholder that he has been guilty of improper conduct in that office. Hence, the article at issue was libelous *per se*, as it was clearly calculated to injure the plaintiff's reputation and to degrade him in public estimation. Its tendency was to imply that plaintiff had acted hypocritically and corruptly in a position of public trust.

As to the liability of a publisher in spreading false charges concerning a public official, the Circuit Court of Appeals relied on the well established rule laid down in *Bennet* v. *Commercial Advertiser Assn.*, 230 N. Y. 125, (R.

30). In the *Bennet* case, plaintiff was an attorney and a Representative in Congress. He was accused of having inserted a "joker" in a bill whereby a former client of his would benefit, and that his actions in the matter were not for the best public interest. The Court held:

> "The libel law has never been confined to charges of illegality or lawbreaking. Any false accusation which *dishonors or discredits a man* in the estimate of the public or his friends and acquaintances or has a reasonable tendency so to do is libelous." (Emphasis supplied.)

And in holding the publication to be actionable *per se*, the Court stated:

> "An article may be libelous which does not charge a crime, but makes accusations, as in this instance, against a public official, which would show him unworthy of public trust and a betrayer of civic confidence."

Any charge of an act which is commonly regarded as an act, not committed by a person properly conducting himself in organized society and among civilized people, and which reflects upon his character in such wise as to expose him to ridicule and disgrace, is libelous *per se*. *Hayes* v. *Van Gelder*, 231 App. Div. (N. Y.) 663.

For other New York decisions involving public officials, see *Evans* v. *Flemming*, 229 N. Y. Supp. 293; *Cartright* v. *Anderson*, 208 App. Div. (N. Y.) 1; *O'Shaughnessy* v. *Morning Journal Assn.*, 24 N. Y. Supp. 609; *McIntyre* v. *Journal Co.*, 5 App. Div., (N. Y.) 609; *Woods* v. *Gleason*, 18 App. Div. (N. Y.) 401; *Edsall* v. *Brooks*, 26 How. Prac. (N. Y.) 426; *De Hoyos* v. *Thornton*, 259 App. Div. (N. Y.) 1; *Hamilton* v. *Eno*, 81 N. Y. 116.

Similarly, in other jurisdictions, it has been held libelous *per se*, to charge nepotism on the part of a public official, *Palmerlee* v. *Nottage*, 119 Minn. 351; or to charge that a postmaster, as political boss, favored a candidate, by ordering his name to go upon the ballot, although not endorsed

by the requisite number of signers, *Knapp* v. *Green*, 123 Kan. 550; or a sweeping charge of official favoritism and misconduct leveled against members of a public board as to each of the members, *Levert* v. *Daily States Pub. Co.*, 123 La. 594; or to accuse a colored government employee of treachery to his race, and working against their interest. *Bailey* v. *Howard*, 7 App. D. C. 184.

In *Tawney* v. *Simonson, Whitecomb & Hurley Co.*, 124 N. W. 229, (Sup. Ct., Minn.) a publication, headed, "Who are these men", was printed, as follows:

> "Tawney proved a falsifier of public documents by his misquotation upon the floor of Congress of a letter from the Secretary of the Treasury and his misstatement of facts with respect to an investigation and exposure in the Bureau of Engraving and Printing."

In holding the publication to be libelous *per se*, the Court said:

> "It imputed to plaintiff want of fidelity to public trust, grossly inconsistent with due fulfillment of official duty, tended to brand him with intellectual dishonesty, to subject him to the contempt and reprobation of right minded men."

The publication in the instant case imputes to respondent "want of fidelity to public trust" and brands him "with intellectual dishonesty." If this is not enough to subject him to "hatred, contempt and ridicule"—what more is needed?

Also, in *Sweeney* v. *Joliet Printing Co.*, Civil Action 1204 (unreported) D. C., N. D. of Ill., involving substantially the same publication as here in issue, Judge Holly stated:*

> "It is one of the fundamentals of our institutions that neither race nor creed shall disqualify one from holding public office. The article in question in effect charges plaintiff with being unworthy of his position

* Judge Holly in another case, *Sweeney* v. *Illinois Publishing and Printing Co.*, Civil No. 1201 (unreported), D. C., N. D. of Ill., held a publication, substantially the same as herein, to be actionable *per se*.

as a Congressman of the United States in making the Jewishness of Emerich Burt Freed a test of his qualifications to hold office.

"It is urged in defendant's Brief that plaintiff has suffered no pecuniary injury as a result of this publication. But pecuniary injury is not necessary. Libel is defined in this state as 'a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation * * * of one who is alive, and thereby expose him to public hatred, contempt, ridicule *or* financial injury.' (Italics mine.) Criminal Code of Illinois, Sec. 177, Smith Hurd Ill. Anno. Stat., Sec. 402. This definition has been adopted by the Supreme Court of Illinois as the definition of libel in a civil action as well as criminal. *Ogren* v. *Rockford Star Printing Co.*, 288 Ill. 405."

See also, *Hassett* v. *Carroll*, 85 Conn. 23; *Bourreseau* v. *Detroit Evening Journal Co.*, 63 Mich. 425; *Com.* v. *Clap*, 4 Mass. 163; *Eikhoff* v. *Gilbert*, 124 Mich. 353; *Robbins* v. *Treadway*, 2 J. J. Marsh. (Ky.) 540.

The United States Circuit Court of Appeals for the Third Circuit, in a recent opinion, as yet unreported [*Sweeney* v. *Phila. Record Co., et al.* (decided Feb. 5, 1942) — F. 2d —] involving a consolidation of three cases filed by respondent against the Philadelphia Record Company, Chronicle and News Publishing Company and Steinman & Steinman, Inc., and growing out of a publication similar to the one at bar, did hold that the matter complained of was not libelous *per se*. However, the decision is easily distinguished from the one at bar in that it appears to have turned specifically upon a Section of the Constitution of Pennsylvania. In taking cognizance of the decision of the Circuit Court of Appeals for the Second Circuit, the Court stated:

"In the case just cited that tribunal passed upon the identical printed matter here under consideration and held it to be libelous *per se*. That there is a substantial difference between the libel law of Pennsylvania and that of New York in respect to public officials is well illustrated by the decision of the Supreme Court of

Pennsylvania in Commonwealth v. Foley, 292 Pa. 277, 141 A. 50. In the cited case the court points out that Article 1, Section 7, of the Constitution of Pennsylvania changes the common law of libel as to one charged with libeling a public official granting immunity where malice or negligence is not established to the satisfaction of the jury. The Constitution of New York contains no similar provision."

(C) Unambiguous Meaning of the Publication.

The article charges respondent with being part of "a hot behind-the-scenes fight" in Congress "to prevent the appointment of a Jewish judge"; the proposed appointee being one Emerich Burt Freed who was "on the verge of being elevated to the U. S. District Court"; that Congressman Sweeney's "violent opposition" had been aroused, and the "basis" of his opposition was the *fact* that "Freed is a Jew, and one not born in the United States"; that Freed was brought to this country at an early age and had been for a number of years a naturalized citizen. After reciting these *statements of fact,* the article concludes with the further *statement of fact* that, "Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment." (R. 3).

As is readily seen, the alleged reasons advanced for respondent's opposition to Freed were not that the candidate was unqualified for office, but squarely on the point that *he was a Jew and a Jew not born in this country.*

The inescapable import of the words is that respondent opposed the appointment of a man because he was a Jew. Whether the word "Jew" was intended by the authors to mean the race or the religion is unimportant. The term is unqualified and in ordinary common parlance is accepted to mean either race or religion, or both. The natural and normal inference to be drawn from the fact that a man is opposed to the appointment of a person to office because that person is a Jew, is that such man is prejudiced against Jews, is bigoted, or dislikes Jews because they are Jews,—

or, in every day language, he is a "Jew-hater." It is to be noted that the opposition of Mr. Sweeney is said to be "violent," indicating that his prejudice, bigotry and hatred are fanatically severe.

As to the meaning to be ascribed to the publication, petitioner asserts that respondent "was publicly" (not stealthily) opposing Freed for appointment to office because of his Jewishness (Pet. Br. 40). This assertion is, of course, erroneous. The article, as published by petitioner, was clearly intended to be a choice bit of inside information: "A hot *behind-the-scenes* fight is raging • • •", (R. 3). (Emphasis supplied.)

Petitioner's parenthetical assertion that "Jews have not infrequently opposed Jews (R. 40), for public office, simply because the candidate was Jewish, is a little (stating it mildly) beside the point, or even beyond the realm of logic. Maybe, Jews have opposed Jews for public office, or Protestants have opposed Protestants, or Catholics have opposed Catholics, or Hindus have opposed Hindus, and so on through all religious denominations, but it taxes one's reason to suppose that the opposition was bottomed solely on the religious belief of the party.

Quoted at length and relied upon by petitioner as authority for an interpretation of the article contrary to that given by the Circuit Court of Appeals, are the decisions in *Sweeney* v. *Beacon Journal Pub. Co.*, 66 Ohio App. 475, app. dism. 138 Ohio St. 330, and *Sweeney* v. *Newspaper Printing Corp.*, 177 Tenn. 196. These decisions, and naturally the limited meaning given the article, turned on an application of the laws of the respective States of Ohio and Tennessee, which, under the *Erie Railroad* decision are of course not applicable to the New York case at bar. It may be well to point out, however, that in the *Beacon Journal case*, the Ohio Court stated that to be libelous *per se* words must impute a violation of *"the moral code or the law of the land."* There can be no serious contention that such is the law of New York.

Petitioner contends that the Circuit Court of Appeals committed error of law in making certain assumptions as to Father Coughlin's alleged anti-Semitism and thereby not adopting petitioner's interpretation of the article (Pet. Br. 41). This contention is obviously incorrect. The majority opinion made it manifestly clear that the Court's decision did not turn on whether Father Coughlin was or was not anti-Semitic—Father Coughlin was not in issue. In the paragraph immediately following the portion of the opinion quoted by petitioner, it is said:

> "But, all else aside, they (the words) do clearly attribute to him (respondent) the desire and purpose to try to prevent the appointment of Freed to the office mentioned for the reason that Freed is a Jew who was foreign born." (R. 29).*

A libelous publication may be, by a process of scholastic ingenuity, tortured into harmless insignificance, but the meaning so ascribed may well not be that which will be understood by the general reading public, which is, in the last analysis, the meaning which the law of libel weighs in determining the actionable quality of the words.

> "In the first place, the old rule that words are to be taken in mitiori sensu, that is, in their milder sense, in determining their actionable character, has long since been abandoned. The former strictness of the English law, requiring that a charge, to be slanderous, must be uttered with the technical precision of an indictment is no longer law. The ordinary signification in popular parlance of the statement made is the vital question in each case, or, in other words, it is a question of the natural and obvious meaning of the words used." *17 Ruling Case Law 312.*

The meaning the publisher placed on the words is not the controlling factor. *Corrigan* v. *Bobbs-Merrill Co.*, 228 N. Y. 458.

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* In a footnote (Pet. Br. 41n) petitioner invites attention to a District Court opinion in Texas (*Sweeney* v. *Caller-Times Pub. Co.*, 41 F. Supp. 163), in which the lower court made the same erroneous observation in reference to the inclusion of Father Coughlin in the consideration of the article.

While the past decade has witnessed a great part of the world enflamed by religious and racial hatred, rivaling if not surpassing, the days of the martyrs and the Dark Ages, our country has stood out as one of the last bulwarks against intolerance.

There can be no doubt but that, among the bloody works of Adolph Hitler, history will pose in bold relief, the tyrant's persecution of the Jews, which treatment of the Jews, to a great extent, was the cause of him being almost universally despised by the people of these United States,—and that even before the outbreak of the present war. These foreign happenings have revived in this country, among its citizens movements to take firmer measures to insure the continuance of tolerance, which we have so long enjoyed. Spokesmen, like Father Coughlin, who have been accused, rightly or wrongly, of fostering religious and class hatred have been held up to contempt.

The position that a widely circulated newspaper can, in a cosmopolitan city, accuse a Representative in Congress of being a racial and religious bigot and with violating his oath of office, without exposing such a representative of the people to the hatred and contempt of not only Jews but all true Americans, is untenable in logic, practice and experience. In other words, no one can sincerely urge this Court to adopt an ideology, that a newspaper can, for instance, with immunity, publish as a fact, although untrue, that Judge Doe of this Court, or any other Court, as Chief Judicial Spokesman of another, or otherwise, opposed the cause of a party because he was a Jew. The adoption of such a philosophy is beyond the conception of millions of citizens of this country who have founded their roots in tolerance. To contend, under established American ideology, that it is perfectly legitimate and American for a Representative in Congress,—who by his oath of office, in effect, swears to defend the principles of democracy,—to subscribe to racial bigotry by conspiring to oppose one for appointment to an office because he is a Jew, surely is another importation of foreign ideologies.

To advocate that this article is not libelous *per se*, the petitioner's position must be, in effect, this—although we (a large city newspaper) have daily expressed our sympathy for all oppressed peoples, including the Jews; although we have bitterly attacked all who are intolerant; although we have editorially solicited the help of all people to fight intolerance; although we have denounced all men in public life, sworn to uphold the principles of democracy, who fail to practice tolerance; we now claim immunity to falsely accuse Representative Sweeney of being intolerant.

The Circuit Court of Appeals properly considered contemporary happenings as to intolerance, (see *Sydney* v. *MacFadden Newspaper Corp.*, 242 N. Y. 208, and cases therein cited), in correctly construing the charges against respondent, at the time in question, particularly, to be libelous *per se*, (R. 30-31).

There is no basis for petitioner's contention that the printed words of ridicule or contempt "related solely to political views or arguments on questions of public interest." There is nothing in the libelous article relating to any "argument" of Representative Sweeney presenting his political "views on questions of public interest," or any other "question". No one reading the article could arrive at any such conclusion. It patently charges acts, constituting a bigoted opposition by Representative Sweeney to a man because of his religion and his race. The Representative was going to leave no stone unturned to stop Mr. Freed being made a Federal Judge.

Applying the test laid down by the Courts of New York State, in the cases cited, *supra*, p. 10, the question is, what affect this accusation had on the minds of the ordinary, reasonable and right-thinking citizens? Certainly, it must have engendered the hatred and contempt of substantially all Jewish citizens. We also contend that it likewise should and did affect all decent citizens, of all races and creeds.

The Court must take judicial notice of the fact that Jews comprise an important and respectable part of nearly every community; that at least an important and respectable part

of every community, other than Jews, consider it un-American to discriminate against a citizen of the United States because of his religion or his race; and that Article 6, Section 3, *Constitution of the United States,* provides:

> "No religious Test shall ever be required as a qualification to any Office or public Trust under the United States;"

It is to be noted that Representative Sweeney, by his oath of office, is sworn to support and uphold the Constitution.*

In this connection it is also worthy of note that the Founding Fathers were deeply cognizant of the powerful and destroying influences of those practitioners of religious hatred. In the words of Justice Story:

> "The framers of the Constitution * * * knew that bigotry was unceasingly vigilant in its stratagems to secure to itself an exclusive ascendency over the human mind, and that intolerance was ever ready to arm itself with all the terrors of the civil power to exterminate those who doubted its dogmas or resisted its infallibility." *Story's Commentaries on the Constitution,* (5th Ed.), Sec. 1847.

To the millions of people, citizens of our government who respect and adhere to the Constitution of the United States, and *who consider themselves tolerant of all races and creeds and demand the same tolerance of their public officials,* such a charge must necessarily make the respondent contemptible and unfit to hold such public office.

Undoubtedly the publication induced that vast majority of our citizens, who are dedicated to the cause of tolerance of race and creed, to look upon Mr. Sweeney with contempt. Such an accusation placed the respondent in disgrace and certainly tended to deprive him of the confidence and friendly intercourse of his constituents. Such was necessarily the

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* *Rules and Manual of the U. S. House of Representatives,* 77th Congress, Page 71, Sec. 229.

natural and normal tendency of this publication. Such would follow even if Mr. Sweeney were but a private citizen. When spoken of him as a public official, as the article expressly does, the shame, hatred, degradation and disgrace is heightened and enhanced. While there might be some "privilege" for respondent, as a private citizen, to oppose the appointment of a Jew, Mr. Sweeney, as a duly elected representative of the people, in Congress, sworn to represent all equally and fairly, could claim no prerogative.

There can be no question but that the Circuit Court of Appeals, therefore, correctly held the article to be actionable *per se* and properly remanded the cause for trial on the merits.

Point II.

The English Rule is Directly in Accord with the Decision of the Circuit Court of Appeals.

A search of the English language reports has disclosed but one decision presenting like imputations as those charged to the respondent. It appears to be squarely in point. The case is *De Stempel* v. *Dunkels* (decided 1938), 1 All. E. R. 238, 54 T. R. L. 289; aff'd. sub. nom. *Dunkels* v. *De Stempel* (1939), 55 T. L. R. 655, H. L. A few of the facts may be pertinent.

The action was for slander and for breach of contract. Plaintiff was the Baron Victor De Stempel, a Russian emigre, married to the stepdaughter of the defendant, Walter Dunkels, who was of the Jewish faith. The defendant was a member and leading director of the Diamond Corporation of England, and his cousin Otto Dunkels, the employer of the plaintiff, was head of the Corporation. Differences arose between the plaintiff and his wife (Walter Dunkel's stepdaughter), ultimately resulting in the defendant lodging accusations against plaintiff with Otto Dunkels. Among the charges made was "Victor is a Jew-hater." For our purposes here, this need be the only accusation considered.

(A) *Appellation of "Jew-Hater" is Defamatory, Per Se.*

At the trial, the jury found the statement "Victor is a Jew-hater" to be defamatory and awarded damages.

When the trial judge overruled the verdict, the Court of Appeals held that to say "Victor is a Jew-hater" was defamatory *per se* and special damages need not be pleaded, or shown. (It is interesting to note that defendant's counsel, while he differed on other points, observed that he "could not contend that the words, 'Victor is a Jew-hater' were not capable of a defamatory meaning.")

While dissenting on certain issues of the case, Slesser, L. J., indicated his accord with the holding that the words complained of were defamatory *per se,* when he said:

> "As to this alleged slander, Sir Patrick Hastings (def's. counsel) admitted that, in the primary sense, it was capable of a defamatory meaning. He said that he was constrained to agree with the view, which I had expressed during the argument, that to say of any man that he was a 'hater' of any person or class of persons was capable of a defamatory meaning. Hatred of anything but wickedness may well be considered to be a vice or a sin. In the Litany where a public recognition of morality and social obligation may properly be sought, there is prayer for delivery from hatred, malice, and all uncharitableness, and, in a Christian country such as England, to say that a man is possessed of hatred is, in my opinion, 'likely to tend to lower him in the estimation of right-thinking members of society generally,' to quote the test mentioned by Lord Atkin in Sim v. Stretch (1936, 2 All E. R. 1237). In Ireland it has been held defamatory to say of a man that he is intolerant: Teacy v. McKenna (1869 I. R. 4 C. L. 374). In New Zealand, it has been held defamatory to say of a man that he has been guilty of unbrotherly conduct: Campbell v. Payton (1889, 17 N. Z. L. R. 91). I would add to the category the statement that a man is afflicted by hatred."

On the same question, Scott, L. J., stated:

> "I deal first with the slander alleged in para. 7 of the statement of claim: 'Victor is a Jew-hater.' Sir Patrick

Hastings (def's. counsel) felt himself unable to argue that these words were incapable of a defamatory meaning. Both the senior members of the court agree with Sir Patrick, and so do I. *The words seem to me obviously defamatory.* To say that a man hates a particular race or class of people is to allege, at the very least, a character which is warped and unlikely to be impartial." (Emphasis supplied.)

While the De Stempel case involved but the spoken word, how more reprehensible is the written word, given permanence in print? The distinction that makes libel the more infamous than the tort of slander was appropriately marked by Mr. Justice Cardozo in *Ostrowe* v. *Lee*, 256 N. Y. 36, as follows:

"The schism in the law of defamation between the older wrong of slander and the newer one of libel is not the product of mere accident (citing authorities). It has its genesis in evils which the years have not erased. Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmuted into print. What gives the sting to the writing, is its permanence of form. The spoken word dissolves, but the written one abides and 'Perpetuates the scandal.' "*

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* That this sound distinction not only obtains in this country, but also in England, may be noted in the following quotation from the treatise of one of the more renowned of English authorities:

"So long as a man's power of effecting mischief is limited to his own immediate and personal efforts, however violent and noxious they may be, against the persons or property of others, the evil which he works must be of a local and limited nature; but when it is extended by exerting a pernicious and wicked influence over the understandings of mankind, through the medium of the press, its power is bounded neither by time nor place; any one vicious and unprincipled mind may, as it were, be brought into contact with, and is enabled to exercise its influence over those millions; thus even a single individual, as if invested with a kind of mischievous ubiquity, is enabled to disseminate blasphemy, sedition and immorality, to the remotest borders of the realm, and the very mass of society may thus be exposed to the danger of contamination and corruption." *Folkard's Starkie on Slander and Libel*, 4th Ed., Page 8.

It would seem a biting paradox if the law of the State of New York with its Jewish population of some 2,260,208 out of some 4,770,647 Jews in the United States, regards statements kindred to "Jew-hater" as benign benedictions, while England with a Jewish population slightly in excess of 300,000, justly condemns and holds up to the rigors of the law those making false accusations of the kind.*

Point III.

The Publication Does Not Come Within the Purview of Fair Comment and Honest Criticism.

The rule of "fair comment and honest criticism," is the single feature that distinguishes libels on private individuals and those whose words and acts are constantly before the public. The rule is not limited to public officials, but applies as well to novelists, actors, athletes and a host of others whose everyday acts are properly "newspaper copy."

Moreover, this defense does not in any particular, affect the *libelous quality of the words,* it merely affords to the defendant a means of escaping liability for the publication if he can bring himself within the rule.

(A) *The New York Rule*

Because of the scarcity of a specific definition of "fair comment," we quote Gatley in his notable work on libel and slander, where he states what appears to be the overwhelming weight of authority:

> "There is no specific definition of fair comment; but from the authorities it is clear that, in that a comment may be fair, the following conditions must be satisfied: (a) *It must be based on facts truly stated.* (b) It must not contain imputations of corrupt or dishonorable motives on the part of the person whose conduct or work is criticized save in so far as such imputations are war-

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* Figures from "*Jewish Statistical Bureau of Synagogues of America*" (1937).

ranted by the *facts*. (c) It must be the honest expression of the writer's real opinion." (Emphasis supplied.) *Gatley on Libel and Slander*, (1938), 3rd Ed., Page 378.

Under the New York authorities, this privilege to comment upon matters of public concern is strictly limited to criticism or opinion, and is not applicable to *misstatements of fact*. *Briarcliff Lodge Hotel, Inc.* v. *Citizen Sentinel Pub. Inc.*, 259 N. Y. 106; *Foley* v. *Press Pub. Co.*, 226 App. Div. (N. Y.) 535; *Cohalan* v. *New York World-Telegram Corp.*, 172 Misc. (N. Y.) 1061; *Sherman* v. *International Publications*, 214 App. Div. (N. Y.) 437; *Hoey* v. *N. Y. Times Co.*, 138 App. Div. (N. Y.) 149, Annotations, A. L. R. 412.

As it has been so aptly stated, "the assertion of a *fact* is not a *comment* at all." *Bingham* v. *Gaynor*, 141 App. Div. 301, aff'd. 203 N. Y. 27.

The *known* or *admitted* acts of a public official are open to fair and honest criticism, which is protected under qualified privilege. But the privilege is *qualified:*

> " • • • because it does not extend beyond fair and honest comment and criticism. It is no protection to the writer if he therein makes *false statements* or unjustifiable inferences. In making such a communication the writer makes *statements of fact* at his peril, and, if the statements made therein are libelous and untrue, the fact that they are made about a *public officer* does not exempt the writer on the ground of privilege." *Bingham* v. *Gaynor*, 203 N. Y. 27. (Italics supplied.)

A few of the very many cases, in accord with the above proposition, are: *De Hoyos* v. *Thornton*, 259 App. Div. (N. Y.) 1; *Cartright* v. *Anderson*, 208 App. Div. (N. Y.) 1; *Lunn* v. *Littaner*, 187 App. Div. (N. Y.) 808; *Hoey* v. *New York Times*, 138 App. Div. (N. Y.) 149; *Hamilton* v. *Eno*, 81 N. Y. 116; *Powers* v. *Dubois*, 17 Wend. (N. Y.) 63; *Littlejohn* v. *Greeley*, 13 Abb. Prac. (N. Y.) 41.

The majority opinion of the Circuit Court of Appeals correctly applied the rule as it relates to public officials, the

same rule that was declared in the noteworthy case of *Hamilton* v. *Eno*, 81 N. Y. 116, where it was said:

> "One may in good faith publish the truth concerning a public officer; but if he states that which is false and aspersive, he is liable therefor, however good his motives. A person in public office is no less to be protected than one who is a candidate for public office; and the law of libel must be the same in each case. * * * Yet it is the law of this state that to accuse a candidate for public office of an offense is not privileged, though the charge was made without evil motive, and in the exercise of a political right. * * * We are of the opinion that the official act of a public functionary may be freely criticized, and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself; and that then the occasion will excuse everything but actual malice and evil purpose in the critic. We are of the opinion that the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer; and that, to be excused, the critic must show the truth of what he has uttered of that kind."

(B) *The Rule Generally.*

That the New York rule generally obtains may be noted from the marked similarity to the language in the *Hamilton* case, used by Judge Taft, later Chief Justice of this Court, in the great landmark case of *Post Publishing Co.* v. *Hallam*, 59 F. 539. Judge Taft, in an opinion undoubtedly representing the overwhelming weight of authority both in this country as well as England, reasons:

> "The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a bona fide statement, on reasonable ground, to the

master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrific which the rule compels the servant to suffer in what was thought to be, when the rule became a law, a most important interest to society. But if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charges upon reasonable ground.

"We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good. We are aware that public officers and candidates for public office are often corrupt, when it is impossible to make legal proof thereof, and, of course, it would be well if the public could be given to know in such a case what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are in fact true, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men, and charges against them, are unduly guarded or restricted, and yet the rule complained of is the law in many of the states of the Union and in England."

Newspapers have no peculiar privilege in commenting on or criticizing public men's public acts. *Lindsey* v. *Evening Journal Association*, 10 N. J. Misc. 1275; nor, is a newspaper privileged to publish a libelous charge about a public official respecting his conduct in office, *Kirkland* v. *Constitution Pub. Co.*, 38 Ga. App. 632; and a publication containing insulting, contemptuous phrases, or false and libel-

ous statements of fact is not privileged, even though it concerns the acts of public officers, *Finnegan* v. *Eagle Printing Co.*, 173 Wis. 5. See also the opinion of Mr. Justice Holmes in *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238. To the same effect: *Davis* v. *Shepstone*, 11 App. Cas. (England) 187; *Arizona Pub. Co.* v. *Harris*, 2 Ariz. 446; *Pierson* v. *Times Picayune Pub. Co.*, 148 La. 817; *Van Lonkhauyzen* v. *Daily News Co.*, 203 Mich. 570; *Dumphiny* v. *Buhne*, 153 Cal. 757; *Sweeney* v. *Baker*, 13 W. Va. 158; *Smith* v. *Burrus*, 106 Mo. 94; *Williams* v. *Saunders*, 133 Va. 156; *State* v. *Haskins*, 109 Ia. 656; *Russel* v. *Washington Post Co.*, 31 App. D. C. 277.

With marked clarity and pungent reasoning, Van Vechter Veeder, in 23 *Harvard Law Review*, 413, 419, summarizes:

> "The whole doctrine of immunity in defamation is based upon public policy, and the only valid objection to protecting statements of fact in relation to candidates for elective office rests upon such considerations. It is the conviction that such a doctrine would do the public service more harm than good. The danger that honorable and worthy men may be driven from politics and public service by allowing such latitude in attacks upon personal character outweighs any benefits that might accrue to the public. Such license would create a disinclination for public life on the part of honorable men by making them feel that it was incompatible with wholesome self-respect and decent reputation; it would drive men of sensibility away from its opportunities in sheer disgust, and leave public employment to callous and self-seeking adventurers. It seems plain that immunity in fair comment extends the utmost protection in matters of public interest that is compatible with a proper regard for personal rights."

(C) *Comment on Established Facts and Fictitious Facts Sharply Distinguishable.*

Petitioner asserts that in respect to comment and criticism, the law of libel, as judicially interpreted by the courts of New York, makes no distinction between comments based upon acts untrovertibly true and those acts which are

untrue. (Pet. Br. 13n.) This assertion is totally erroneous and predicated upon a mistaken interpretation of the very cases upon which petitioner relies. To illustrate, we have but to note the facts in *Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. (N. Y.) 203, which decision petitioner appears to lean upon heavily (Pet. Br. 6, 13, 17, 24). In the *Tanzer* case, plaintiff was a Mayor, in which capacity he had appointed a city attorney. Defendant, in *commenting on the appointment*, attributed it to dishonorable motives. The fact that the paintiff had appointed the city attorney was an *established truth*. Hence, the defendant brought itself within the rule of fair comment and criticism by commenting on *facts truly stated*, even though the comment itself was allegedly *false*. Similarly, in *Hills* v. *Press Company*, 122 Misc. (N. Y.) 212 (commenting on established *acts* of plaintiff, though the comment was allegedly false); *Gardner* v. *Home Life Pub., Inc.*, 237 App. Div. (N. Y.) 200 (plainly within the rule, and moreover containing nothing of a vicious or disgraceful character), *Cartwright* v. *Anderson*, *supra* (comment on "wet" propensities of a *candidate* for office, but the charge of intending to align with gamblers, held libelous *per se*), *DeHoyos* v. *Thornton*, *supra* (mere allegations of waste and extravagance in official administration, obviously comment and criticism, but, charge of being dictated to by gamblers held libelous *per se*). In *Rossiter* v. *New York Press Co.*, 141 App. Div. (N. Y.) 339, plaintiff had been an expert witness for the city. Comment and criticism as to whether the services which he *actually rendered*, were worth what he was paid, was correcly held within the rule of fair comment.

An excellent example of the boundaries of fair comment may be found in the recent decision in *Hall* v. *Binghamton Press Company* (decided March 4, 1942), —— App. Div. (N. Y.) ——. Defendant in that case published criticism of the vote of plaintiff, a Representative in Congress, on what is known as the "lend-lease" bill. It was an *established fact* that Hall had actually voted on the bill. There-

fore, his vote was properly the subject of legitimate comment and criticism. Because the *act* of voting was a truly stated *fact*, the ensuing comment could have been false and yet come within the rule of "fair comment and criticism." It may be noted that, even in the Hall case, affording on its fact almost unquestioned protection under the defense of "fair comment and criticism," the decision was by a divided Court, with two of the judges holding that the publications complained of were susceptible of a libelous meaning and should be submitted to the jury.

In the case at bar, the publication does not *comment* or *criticize* any established *act* of respondent, either as a Representative in Congress or even in his private capacity. The article charges that there was "a hot behind-the-scenes fight" over the proposed appointment of Mr. Freed; that "this has aroused the violent opposition" of respondent; that, the basis of his "opposition is the fact that Freed is a Jew," and that "Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives," on a *date certain*, to protest against the appointment of Freed (R. 3). Each of the charges are set forth as *established facts*. Respondent pleaded the *falsity* of each and all of them (R. 13). Hence, they became issues in the action and the subject of proof at the trial.

The charges against Representative Sweeney do not refer to his "state of mind" or "opinion," as petitioner asserts, but relate solely to his alleged *acts*, in a purported effort to stop the appointment of Mr. Freed, solely because Mr. Freed was a Jew.

The accusations directed at respondent are nothing else than *statements of fact*.

As we have seen, the article in each of the cases petitioner relies upon was "comment" and "criticism," which, although allegedly false, was based upon established *acts* of the person criticized. Consequently, they afford no precedent for the case at bar.

The utter fallacy of petitioner's contention lies in the marked failure to make any distinction whatsoever between

comment and criticism, based upon acknowledged *acts* of respondent, and comment and criticism based upon *false* statements of fact. Simply because an individual holds public office, it is not a logical sequitur that baseless charges such as thief, murderer, adulterer, "Jew-hater", or of whatever nature, tending to hold him up to the scorn and contempt of decent people, may be hurled at him with impunity, under the guise of "fair comment and criticism."

(D) *In Any Event, Under the Facts of the Case, the Defense of Fair Comment is Properly a Jury Question.*

Whether or not the allegations in the publication, are allegations of fact or expressions of *opinion*, and, if expressions of opinion, (which we contend they are definitely not), whether such expressions are fairly warranted by facts truly stated, are questions for the jury to decide under proper instructions from the trial judge. In the case of *Foley* v. *Press Publishing Company*, 226 App. Div. (N. Y.) 535, (involving an officer of the United States Navy), at page 546, the court stated:

> "It is a question for the jury to decide, subject to the direction of the judge, whether in the particular case the defendant's allegations are allegations of fact or expressions of opinion, and, if expressions of opinion, whether such expressions of opinion are fairly warranted by the facts truly stated or referred to."

And, in *Cohalan* v. *New York World-Telegram Corp.*, 172 Misc. (N. Y.) 1061, (involving an official referee of the New York Supreme Court), the Court said:

> "The question of whether an editorial writer has exceeded fair criticism, is by the weight of modern appellate authorities, properly submitted to the jury, even where there may be a doubt." Citing *Kenna* v. *Daily Mirror, Inc.*, 250 App. Div. 625, aff'd. 276 N. Y. 483; *Triggs* v. *Sun Printing & Publishing Assn.*, 179 N. Y. 144; *McInerney* v. *New York World Telegram Corp.*, 166 Misc. 266.

Here, the charges directed at Representative Sweeney are stated as *facts*, not as *opinions* of the publisher, and even if they might be construed as opinions or criticism of Mr. Sweeney, by the petitioner, there are no *facts* stated or referred to on which such opinions or criticism could be predicated, and, in any event, if there be such facts, it is for the jury to decide whether or not they are *truly stated.*

Point IV.

Constitutional Guarantees Afford No Protection for the Abuse of Freedom of the Press.

"Freedom of the press" is a phrase invariably resorted to by every publisher-defendant, when brought to the bar to answer for its abuse. This "freedom", *properly exercised*, forms one of the commonplace panegyrics of every free government. But punishment for the abuse of the privilege is so well established and so manifestly good sense as to hardly need citation of the books.

The individual's right to a good reputation, when he has done nothing to cause it to be otherwise, in no way encroaches upon or curtails the constitutional guaranty of the liberty of the press. It does not assail the liberty of the press, but rather fortifies it by purging it of its iniquities.

As stated in *Cooley's Constitutional Limitations*, (7th Ed.), p. 883:

> "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals.
>
> "That this constitutional protection shields no one from responsibility for abuse of this right. To hold that it did would be a cruel libel upon the Bill of Rights itself. . . . Equally numerous and strong are the de-

cisions that obscene publications are without the protection of this provision of our Constitution.

"Liberty in all its forms and assertions in this country is regulated by law. It is not an unbridled license. Where vituperation or licentiousness begins, the liberty of the press ends."

And, in 32 L. R. A., 829n, it is stated:

"The protection of free speech under the Constitution may often be claimed *when the only question really in dispute is the question whether the language in question is libelous or slanderous.* If it is, the constitutional provision does not apply. This is made evident by all the decisions.

"That libel and the punishment of libelers do not infringe the constitutional freedom of the press, is, in substance, declared in Morton v. State, 3 Tex. App. 510; Story v. People, 79 Ill. 45; Runkle v. Meyer, 2 Am. Dec. 393; State v. Morrill, 16 Ark. 384; Haskell v. Faulds, 17 Mont. 140; Respublica v. Dennie, 2 Am. Dec. 402; Cincinnati Gazette Co. v. Timberlake, 78 Am. Dec. 285; Jones v. Townsend, 21 Fla. 431; Sweeney v. Baker, 13 W. Va. 182; and in all other cases in which the question has been presented." (Italics supplied.)

In the broadest interpretation of the constitutional immunity, the freedom of the press and of speech does not include that which is generally recognized as harmful, such as libelous, obscene, or seditious matter, or that which was deemed harmful according to common-law standards; nor does it afford an absolute right, without subsequent responsibility to speak, write, or print whatever one may please. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287; *Whitney* v. *California,* 274 U. S. 357; *Gitlow* v. *New York,* 268 U. S. 652; *Gilbert* v. *Minnesota,* 254 U. S. 325; *Abrams* v. *United States,* 250 U. S. 616; *Schenck* v. *United States,* 249 U. S. 47; *Frohwerk* v. *United States,* 249 U. S. 204; *Debs* v. *United States,* 249 U. S. 211; *Robertson* v. *Baldwin,* 165 U. S. 275; *In Re Rapier,* 143 U. S. 110; *Ex Parte Jackson,* 96 U. S. 727.

As was said by Mr. Chief Justice Hughes, in *Near* v. *Minnesota*, 283 U. S. 697, 715:

> "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions."

And, by Mr. Justice Murphy in *Chaplinsky* v. *State of New Hampshire*, decided March 9, 1942, ... U. S. ....:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

And, by Mr. Justice Roberts in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 133:

> "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel." *

See also 16 C. J. S., Sec. 213, P. 630; *Post Pub. Co.* v. *Hallam*, (C. C. A. 6th), 59 F. 539; *KVOS* v. *Associated Press*, (D. C. Wash.), 13 F. Supp. 910; *Gitlow* v. *Kiely*, (D. C., S. D., N. Y.) 44 F. 2d 227; *Chamber of Commerce* v. *Fed. Trade Commission*, (C. C. A. 8th) 13 F. 2d 673; and, *Trinity Methodist Church, South* v. *Fed. Radio Commission*, (D. C. App.), 62 F. 2d 850, in which the Court affirmed the action of the Commission in denying a broadcasting license in view of previous broadcasts which

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* As one famed publisher is reported to have said: "freedom of speech * * * is the right of every man as by it he does not hurt or control the right of another * * *." *"Benjamin Franklin,"* by Carl Van Doren (p. 27).

charged judges with corruption, maligned public officials and made attacks upon Jews and Roman Catholics.*

That the framers of the Constitution intended there be just punishment for the abuse of the freedom of the press is evidenced from the early writings of Mr. Justice Story. The famed jurist in his *Commentaries on the Constitution*, at Section 1880, (5th Ed.) states:

> "That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. * * * Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassinations and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government. It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel, that every man shall be at liberty to publish what is true, with good motives for justifiable ends. And with this reasonable limitation it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty, and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form."

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* In the case of *Sweeney* v. *Joliet Printing Co.*, Civil No. 1204, in D. C., Northern Div., Ill. (unreported), involving substantially the same article as here in issue, Judge Holly stated: "Freedom of the press does not mean irresponsibility for newspaper publishers. And that freedom will best be preserved through the exercise of care by the publishers in verifying slanderous statements before publishing them."

And, again at Section 1884, (p. 673):

> "There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such that, like the King of England, it could do no wrong, and was free from every inquiry and afforded a perfect sanctuary for every abuse; that, in short, it implied a despotic sovereignty to do every sort of wrong, without the slightest accountability to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer with regard to the rights and duties belonging to governments generally, or to the State governments in particular. If it were admitted to be correct, it might be justly affirmed that the liberty of the press was incompatible with the permanent existence of any free government."

Petitioner's contention that the purport of the decision of the Circuit Court of Appeals, *if* embodied in a statute would be violative of the constitutional guarantees, is pure fantasy. In the words of Mr. Justice Roberts in *Associated Press* v. *National Labor Relations Board, supra,* (p. 132):

> "Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances."

The cases relied on by petitioner, in attempting to show a violation of the constitutional guarantees, are not opposed to oft repeated pronouncements of the Courts of New York State and followed by the majority of the Circuit Court of Appeals in this case. It will be observed that not one of the decisions of this Court, as cited by the petitioner, involved a *civil suit for libel.* On the contrary, the cases generally pertain to statutes and ordinances, which were struck down as involving an express prohibition of free speech or, through an arbitrary licensing system, sought to accomplish the same end. This is true of *Hague* v. *C. I. O.,* 307 U. S. 496, a public assemblage controversy; *Thornhill* v. *Alabama,* 310 U. S. 88, an anti-picketing ordinance; *Cant-*

well v. *Connecticut*, 310 U. S. 296, as to Count Three which dealt with a licensing ordinance held to be directly restrictive of freedom of speech and religion. And, in *Bridges* v. *California*, 314 U. S. ..., 86 L. Ed. 149, involving a Court's power to punish for criminal contempt, the facts were obviously in no way analogous to the facts at bar.

It seems clear from all the authorities, that the individual's right to his reputation is as basic as the right of a free press. And to permit actions for defamation is not a limitation on the freedom of the press, but merely a equitable curtailment of the power to abuse that right when it traduces the character of innocent people—whether they be public officials or otherwise. The right to a decent reputation does not push forward the frontier of human freedom, but repels the assault on human liberty; it enters on the conquest of no new territory, but sets up its lawful sovereignty over territory long ago acquired. The rights of a free press and of reputation creates no schism in the law, but unites and solidifies the eternal and imperishable principles of right, upon which all law and justice must be deemed to be founded.

It is not whim or caprice, nor fancied or imagined wrongs, that drives all to cherish a good reputation, nor, is it a dream of theorists, pamphleteers and publicists, but the assertion of a claim and a demand for justice by every self-respecting person.

His claim to his reputation makes no harsh or imperious demands, difficult or impossible to satisfy reasonably, nor does it prescribe lines of action or a course of conduct for the press that amounts to censorship—or even the shadow of it. The liberty of the press is not involved. To cleanse the stream of its pollution stops not the flow of its waters. "Freedom of the press" is not a license to abuse the privilege, but recklessness in the use of a privilege has often brought the user into trouble, while the privilege itself remained unimpaired.

We need search no further than world events of the past few years to be reconciled to the fact that license never

created either justice or liberty, but has been repeatedly the cause of the overthrow and loss of both.

Human freedom is not enlarged or is the liberty of the race enhanced by extending judicial license to the libeler to falsely attack the reputation of the public official on the ground that he is "fair game." To be forever pilloried in the files of petitioner's newspaper and in the minds of the reading public, as a "Jew-hater," is not a contribution to the freedom of the press, but a sacrifice to its license, greed and tyranny.*

CONCLUSION.

Extracts from publications concerning individuals from the time of George Washington down to the present day are set out in the appendix to petitioner's brief, (pp. 49-60). We maintain that they have no proper place in the case at bar, for it is obviously impossible to determine the collateral issues that would arise if an action for libel had been commenced in each instance. Many of the statements appear to be clearly libelous, but on the other hand many of them are probably *true*. In any event, the commonplace homily that "two wrongs do not make a right," seems to be pertinent.

It is not persuasive to a decision herein, that George Washington, Abraham Lincoln, and others in public life did not seek legal relief for the defaming of their reputations.*

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* As it has been so aptly said: "The only way to preserve the liberty of the press is to punish it for its prostitution." *Cooper's Notes on Justinian*, p. 636.

* It may be observed that ex-President Hoover allowed "scurrilous material", published in the "Washington Merry-Go-Round" to pass by unnoticed, but it is said that his amusement was greatly increased by the discharge of the authors from their respective newspapers. As stated by one of the attorneys for the petitioner herein: "These young authors may learn in time that there are other answers to a libel than an action for damages in a court of law." *"Hold Your Tongue!"*, by Morris Ernst and A. Lindey. But, General Douglas MacArthur was apparently not so content as appears from the suit filed against the authors of the "Merry-

The law of libel did not go into oblivion because of circumstances which might well have precluded the maintenance of a successful suit in each instance.

It is submitted that, the publication complained of unquestionably held respondent up to the scorn, contempt and ridicule of all right-thinking people; that, it charged him not only with anti-Semitism but with practicing religious and racial intolerance in connection with his official office; that, it accuses him of *acts* not founded upon *facts truly stated* and is accordingly neither *comment* nor *criticism;* that, the constitutional guarantees of free speech and of the press is not a license to abuse the privilege; that the decision of the Circuit Court of Appeals is not only in accord with all established precedents of both this Court, and the New York Court of Appeals, but is sound in logic and reason, and should therefore be affirmed.

Respectfully submitted,

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Go-Round" in 1934, in the United States District Court for the District of Columbia (Law 84010), in which the distinguished General asked for damages in a stupendous amount for alleged defamation.